

Internal Revenue Service
memorandum

CC:TL-N-10253-90
TS/P/MAKEYES

date: DEC 7 1990

to: District Counsel, Philadelphia CC:MA:PHI

from: Chief, Tax Shelter/Partnerships Branch CC:TL:TS/P

subject: [REDACTED] - Telescoping

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Keyes Wilson

This is in response to your request for technical advice on whether telescoping can be used in a TEFRA partnership proceeding, and if so, can the notice of FPAA include the adjustments which are being telescoped from other years. If telescoping can not be used, advice was requested as to what other ways Examination could accomplish the same results.

ISSUE

1. Can a notice of FPAA be issued for one year ([REDACTED]) in which adjustments for subsequent barred years ([REDACTED] and [REDACTED]) and an adjustment from an unbarred year ([REDACTED]) are telescoped into that year?

CONCLUSION

No. Telescoping is a settlement vehicle. It is not a procedure which extends authority to the Commissioner to make adjustments in an FPAA for years that are otherwise barred or for which audits have not been completed.

FACTS

[REDACTED] is a TEFRA partnership. There are [REDACTED] general partners and [REDACTED] limited partners. In [REDACTED] the partnership was formed for the purpose of acquiring, rehabilitating and renting [REDACTED]. Between [REDACTED] and [REDACTED] of [REDACTED] the properties were rehabilitated and rented. The properties qualified for the 25% rehabilitation credit, I.R.C. § 42 which was claimed on the partnership's [REDACTED] return. The partnership also claimed certain depreciation deductions on that return.

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An examination of the partnership was conducted for the [REDACTED] year, and as a result there was an adjustment to the rehabilitation credit. The credit was reduced due to the fact that section 38 property and personal property items were removed from claimed rehabilitation expenditures. The amount of depreciation allowable for [REDACTED] was reduced because it was determined that the property was not placed in service at the beginning of the taxable year. Also, because certain items were reclassified as ACRS property rather than rehabilitation expenditures, it was determined that an additional amount of depreciation expense would be allowable for the [REDACTED]-[REDACTED] years. However, [REDACTED] and [REDACTED] are now barred.

It was suggested as a means of saving the Service and the taxpayers the time and expense of having to file and process amended returns for the partnership and the individual partners, that telescoping be used. That would entail making the adjustments in [REDACTED] for the [REDACTED] year, and the subsequent year adjustments ([REDACTED]-[REDACTED]). In other words, the net depreciation adjustments for [REDACTED], [REDACTED], [REDACTED] and [REDACTED] would be combined into one adjustment for [REDACTED] and an FPAA to that effect would be issued. The proposed FPAA specifically refers to part of the [REDACTED] adjustment as "depreciation [REDACTED]-[REDACTED]."

The incoming request for technical advice states that Examination wants to avoid entering into closing agreements for all the years for which telescoping would be used. The request also noted that the [REDACTED] and [REDACTED] years are closed as the statute of limitations for those years has expired. The [REDACTED] year statute is open until [REDACTED]. The TMP and general partners, as well as [REDACTED] limited partners have entered into settlement agreements (Forms 870-P) with the Service. [REDACTED] of the partners have not signed 870-Ps. Your concern is that if any of the remaining partners petition from the FPAA, the Court may find that it does not have jurisdiction for the later year adjustments.

DISCUSSION

Perhaps it is best to start off by discussing what telescoping is, and how it can be used. "Telescoping" is not a term of art. Instead it is a term being used to describe a type of settlement vehicle. It came about as a means to expedite the processing of settlements. Generally speaking, telescoping is the summation of a taxpayer's adjustments for one shelter or issue from multiple years into one adjustment for one year, which year is usually docketed. The Service combines the raw partial adjustments from several subsequent years into a single partial adjustment for the docketed year and computes a stipulated deficiency based, in whole or in part, upon the telescoped adjustment. The later years are then "no changed" as to the telescoped issue. The advantage to this procedure is that a

taxpayer's entire involvement in a shelter or given issue spanning several years can be settled at once. Furthermore, if one of the years results in an adjustment favorable to the taxpayer, he can get credit for it without having to file a claim for refund.

To implement this procedure, we usually use a decision document or a Form 870-P for the year into which the telescoped adjustments have been made, supplemented by closing agreements. The decision document would reflect the tax result of the net telescoped adjustments, and an 870-P would merely summarize those net telescoped adjustments. The closing agreements would provide that for the years from which the telescoped adjustments were drawn, neither the government nor the taxpayer could make any future claims regarding the telescoped issue. This protects the government from a refund claim after the taxpayer has already received credit for a favorable adjustment. It also protects the taxpayer against the government from an accidental future attempt to adjust a subsequent year on that issue.

From the facts provided in the incoming request, and the copy of the proposed FPAA that was submitted, the proposed telescoping procedure in this case differs from the format discussed above. Instead of settling an existing case and subsequent years by telescoping, you propose to set up an original case by telescoping. Your proposed vehicle is to issue a notice of FPAA for the taxable year [REDACTED] which includes a depreciation adjustment. That depreciation adjustment will be the sum of the adjustments for [REDACTED]-[REDACTED] inclusive. As you noted in your incoming request this could raise a jurisdictional question with the Court if the FPAA were petitioned. Even though those adjustments purport to be one adjustment for [REDACTED], as a practical matter they are in fact adjustments to other years over which the court has no jurisdiction.

There is analogous case law in the statutory notice area which makes it clear that the Court does not have jurisdiction over adjustments for years that are not before the Court. Gillespie Trust v. Commissioner, 21 T.C. 739 (1954); Owens v. Commissioner, 50 T.C. 577 (1968). For the Court to have jurisdiction it is necessary for a deficiency to be asserted. Id. The deficiency is asserted by the statutory notice of deficiency. Although a notice of FPAA does not assert a deficiency per se, it does assert adjustments that are to be redetermined and it serves the same function as a statutory notice.^{1/} The notice of FPAA provides the basis for the Court's jurisdiction, along with a timely petition. The Tax Court has applied case law from the

^{1/} A deficiency is not asserted because of the nature of the proceeding. The adjustments flow through to the partners. Only the partners can have a deficiency.

statutory notice area to TEFRA cases involving the court's jurisdiction over years not petitioned. See Tempest Associates, Ltd. v. Commissioner, 94 T.C. No. 49 (June 4, 1990). It is logical that it would apply the law here. The proposed notice of FPAA in this case is for the [REDACTED] year, not the [REDACTED]-[REDACTED] years. If the notice was issued and petitioned the Court most likely could not take jurisdiction over those years.

Another related problem with this proposed FPAA is that the proposed depreciation adjustment for [REDACTED] is simply incorrect to extent that it includes the telescoped amounts. The correct depreciation for [REDACTED] is obtained by adding the adjustment marked "depreciation [REDACTED]" to whatever was claimed on the Form 1065.

As stated earlier, telescoping is a settlement vehicle, a means to expedite settlements. It can also alleviate problems which may occur with barred years since the adjustments will be telescoped into an open year. But telescoping does not confer jurisdiction upon the Court if jurisdiction does not already exist. Therefore, it is not a means of putting before the Court issues for years that have not been examined. The basis of the Court's jurisdiction is a valid notice of FPAA, which is based upon the examination of the partnership's return for that year. The only year that was examined and the only year the notice of FPAA lists is [REDACTED]. The items which are telescoped are not to be reflected in a notice of FPAA if the notice is not for the years from which the adjustments are telescoped. The notice of FPAA should reflect the correct tax for the year for which it provides jurisdiction. It is the use of the 870s and the closing agreements which actually provide the mechanism of telescoping.

Telescoping can be used in this case, but not in the manner Examination is attempting to use it. The proposed notice of FPAA should not be sent as it is now. The notice should only reflect the adjustments for [REDACTED] year. If telescoping is used in the manner described here as a means of settlement after a correct FPAA has been issued, we do not see any problems with its use.

Should you have any additional questions please contact Marsha Keyes at FTS 566-4174.


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